INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

Clark v. *Paul Gray, Inc.*, 306 U. S. 583	6
Covington & Cincinnati Bridge Co. v. *Hager*, 203 U. S. 109	7
Cunard S.S. Co. v. *Sullivan*, 6 F. 2d 383	6
Graham v. *Norton*, 15 Wall. 427	7
Henneford v. *Nor. Pacific Ry.*, 303 U. S. 17	6
Jackson v. *Allen*, 132 U. S. 27	6
Kinney v. *Columbia Savings and Loan Association*, 191 U. S. 78	6
Knapp v. *Lake Shore R. Co.*, 197 U. S. 536	7
Miguel v. *McCarl*, 291 U. S. 442	7
Rosenbaum v. *Bauer*, 120 U. S. 450	7
Sun Printing & Publishing Association v. *Edwards*, 194 U. S. 377	6
Victory v. *Manning*, 128 F. 2d 415	6

Statutes:

Act of August 23, 1912, 37 Stat. 360, 413, as amended	3
28 U. S. C. 1653 (adapted from 28 U. S. C. (1946 ed.) 399))	2, 6
Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended 5 U. S. C. 861, 863	3

Miscellaneous:

Cyclopedia of Federal Procedure (2d ed.):	
§ 295	6
§ 1898	6

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 345

SYLVESTER D. JOY, ET AL., PETITIONERS

v.

WESLEY MCLAREN HAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (2 R. 106)[1] is reported at 81 F. Supp. 590. The opinion of the Court of Appeals for the First Circuit (2 R. 123-126) is reported at 175 F. 2d 395.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1949 (2 R. 126). The petition for

---

[1] The record is printed in two volumes without continuous pagination. The designation (1 R.), therefore, will be used to refer to volume 1, and (2 R.) to volume 2.

a writ of certiorari was filed on September 22, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

A motion to dismiss the complaint was made in the district court on the ground that petitioners had not alleged the required jurisdictional amount in controversy. The District Court allowed petitioners two weeks to file an affidavit setting forth in detail evidence to support the necessary jurisdictional amount. Upon their failure to comply with this direction, the complaint was dismissed for lack of jurisdiction. Without further proceedings in the district court an appeal was taken which assigned as error the dismissal for lack of jurisdiction. In the appellate court, for the first time, petitioners filed a motion for leave to file an amended complaint, together with supporting affidavits, to show the jurisdiction of the district court. These affidavits were controverted in part by an opposing affidavit.

The question presented is whether, in these circumstances, the Court of Appeals was required to permit the amendment of the complaint and to resolve the factual differences in the opposing affidavits.

STATUTE INVOLVED

28 U. S. C. 1653 provides as follows:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

STATEMENT

This action was originally brought by petitioners, employees in the Boston Naval Shipyard, to restrain their proposed demotions as violations of the Act of August 23, 1912, 37 Stat. 360, 413, as amended, and the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended (1 R. 2-9, 11-12). The gist of the complaint was that the proposed demotions from their supervisory positions violated petitioners' statutory rights as honorably discharged veterans because nonveterans were being retained in similar positions (1 R. 7-8). The demotion of petitioners was proposed only after a comparison of their qualifications with those of competitors and a determination that their demotion would promote the efficiency of the service (2 R. 77, 78). This action was taken in reliance upon Section 14 of the Veterans Preference Act (5 U. S. C. 863), which, in contrast with Section 12 of the Act (5 U. S. C. 861), authorizes demotion "for such cause as will promote the efficiency of the service" (2 R. 77, 84, 86, 43-46, 74). Petitioners have been since demoted (2 R. 78) and now regard their action as one for a mandatory injunction to compel their restoration (Pet. 11).

Petitioners brought this action without taking advantage of their right to appeal to the Civil Service Commission provided by the Veterans Preference Act, as amended. 5 U. S. C. 863. For this reason, the complaint was dismissed by the

District Court on the ground that the petitioners had failed to exhaust their administrative remedy (1 R. 11; 74 F. Supp. 396). The Court of Appeals held that exhaustion of administrative remedy was unnecessary under the allegations of this case and reversed (2 R. 4-7; 168 F. 2d 825).

After the remand of the case, respondents moved to dismiss the complaint on the ground, among others, that the District Court lacked jurisdiction because petitioners had not alleged that the amount in controversy as to each of them was at least $3,000, and that the amount actually in controversy was, in fact, less (2 R. 17-18). Pursuant to this motion, the District Court, on December 17, 1948, directed that "if any plaintiff is prepared to show that his claim does involve such amount" he "file no later than December 31, 1948 an affidavit setting forth in detail the evidence on which he rests his claim that such an amount is in controversy" (2 R. 105). The petitioners made no attempt to comply with this direction and an order of dismissal for lack of jurisdiction was entered by the District Court on January 4, 1949 (2 R. 105-107).

Without attempting further steps in the District Court to correct the jurisdictional omissions, petitioners appealed from the judgment of dismissal (2 R. 107-108). In the Court of Appeals, for the first time, petitioners moved for leave to file an amended complaint alleging the necessary jurisdictional facts and submitted supporting affidavits (2 R. 113-119). Respondents filed an opposing affidavit which

controverted petitioners' allegations as to the amount in issue (2 R. 119-122). The Court of Appeals denied the motion and affirmed the dismissal for lack of jurisdiction (2 R. 126). The court held that the decision of the District Court was mandatory on the record before it, and declined to permit petitioners "to make a record of facts which they refused to make in the trial court" for the purpose of having it "declare this correct judgment erroneous, not because of anything the trial court did, but because of something which they now seek to inject into the record and which was never before that court" (2 R. 125).

ARGUMENT

1. Petitioners do not appear to contest the validity of the holding below with respect to the jurisdictional requirement, but urge that the Court of Appeals was required to permit them to file an amended complaint at the appellate level and to enlarge the record by accepting affidavits with respect to controverted facts. The issue posed is obviously not one of general importance as it can hardly be assumed that cases will frequently arise in which the opportunity to correct jurisdictional defects at the trial level is rejected only to be asserted in the appellate court as a matter of right.

Moreover, the court below was clearly correct in denying petitioners' motion. An appeal may not be sustained where the district court's judgment, on the record before it, is not disputed, but error is

asserted on the basis of a new record sought to be made in the court of appeals (see opinion below, 2 R. 125). Although affidavits may be received by appellate courts to establish their own jurisdiction, they will not be accepted "for the purpose of supplementing the record by showing the amount in controversy" because "review of the action of the district court in assuming jurisdiction is confined to the record before the district court." *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589-590; *Henneford* v. *Nor. Pacific Ry.*, 303 U. S. 17.

The terms of 28 U. S. C. 1653 (adapted from 28 U. S. C. (1946 ed.) 399) do not touch this rule. The section provides that "defective allegations of jurisdiction may be amended" but says nothing concerning correction of a defective record. Thus amendments may appropriately be permitted only when the facts of record indicate the presence of jurisdiction which has been imperfectly alleged. See *Kinney* v. *Columbia Savings and Loan Association*, 191 U. S. 78; *Jackson* v. *Allen*, 132 U. S. 27; *Sun Printing & Publishing Association* v. *Edwards*, 194 U. S. 377; *Victory* v. *Manning*, 128 F. 2d 415, 417 (C. A. 3); *Cunard S.S. Co.* v. *Sullivan*, 6 F. 2d 383 (C. A. 2); Cyclopedia of Federal Procedure (2d ed.), §§ 295, 1898. The necessary jurisdictional facts did not appear on the face of the present record. And in any event, the discretion embodied in the provision of 28 U. S. C. 1653 that amendments may be made "upon terms" clearly justifies a denial by a court of appeals of leave to

amend where a party has failed to take advantage of the opportunity to amend upon the terms offered by the district court.

2. Even if petitioners had properly alleged and proved the requisite jurisdictional amounts, dismissal of their complaint was nevertheless justified because the District Court has no jurisdiction over mandamus actions. In the present posture of the proceeding, petitioners seek a mandatory injunction directing government officials to perform a duty which, under their theory, is clearly prescribed by statute (Pet. 11). If petitioners' theory of their case is correct, the action must fail as one for mandamus in a court which has no mandamus jurisdiction. This Court has made clear that an action for a mandatory injunction in similar circumstances "is in effect equivalent to a writ of mandamus, and governed by like considerations." *Miguel* v. *McCarl,* 291 U. S. 442, 452. But the decisions of this Court also establish beyond question that, except for the District Court for the District of Columbia, the federal district courts have no original jurisdiction to issue writs of mandamus. *Graham* v. *Norton,* 15 Wall. 427; *Rosenbaum* v. *Bauer,* 120 U. S. 450; *Knapp* v. *Lake Shore R. Co.,* 197 U. S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager,* 203 U. S. 109.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
MORTON LIFTIN,
DAVID B. BLISS,
Attorneys.

OCTOBER 1949

U. S. GOVERNMENT PRINTING OFFICE: 1949 859316 249